

HEARING DECISION

Petitioner:

[REDACTED]

Petitioner's Address:

[REDACTED]
[REDACTED]

Petitioner's Parents:

[REDACTED]
[REDACTED]

Respondent:

Kyrene Elementary School District
8700 S. Kyrene Road
Tempe, AZ 85284

Respondent's Representative:

Denise Lowell-Britt, Attorney at
Law – Udall, Shumway & Lyons
30 W. First Street
Mesa, AZ 85201

Petitioner's Representative:

[REDACTED]

Impartial Hearing Officer:

Harold J. Merkow
1102 W. Glendale Ave. #116
Phoenix, AZ 85021

Dates of Hearing:

January 27, February 7, February
21, 2006

Date of Decision:

March 21, 2006

IDENTITY KEY

Respondent School District = Kyrene Elementary School District

Petitioner = [REDACTED]

Petitioner's mother = [REDACTED]

Petitioner's father = [REDACTED]

Present Private Placement = Desert Garden Montessori School

Special Education Director = Dr. Shari Dukes

District psychologist = Timothy Kigin

Initial Evaluator = Christa Bishop, Ph.D.

2003 evaluator = Dr. Paul Beljan

2005 evaluator = Janet Chao, Ed.D

Psychology Center = Melmed Center

home school = Altadena Middle School

This matter came on for hearing in January and February 2006 to consider the due process hearing request submitted on June 30, 2005 and supplemented on July 19, 2005. The purpose of the hearing was to consider the due process hearing request of Petitioner's parents seeking a declaration that the Respondent School District has not offered a FAPE-compliant IEP for education services to parentally-placed, privately-educated Petitioner. Petitioner was represented by his mother. Respondent school district was represented by Denise Lowell-Britt, Attorney at Law. The hearing was conducted as a closed hearing.

Through this due process hearing request, Petitioner's parents are seeking a declaratory judgment that the Respondent School District has not offered an appropriate IEP for Petitioner, that, because the Respondent School District has not offered an appropriate IEP, Petitioner has no obligation to enroll in the Respondent School District and that, because the Respondent School District has not offered an appropriate IEP, Petitioner is entitled to compensatory education at Respondent School District's expense¹.

Having heard testimony of the witnesses, having read and

¹ Petitioner is also seeking additional compensatory education services based on a claim of District-caused delay in convening an IEP conference.

considered the exhibits admitted into evidence, having read and considered the parties' oral and written arguments and being fully advised in the premises, the undersigned hearing officer now makes the following findings of fact and conclusions of law and enters the following decision².

FINDINGS OF FACT

1. Petitioner is a [REDACTED] year old male student who has attended his present private placement since 2004 when Petitioner's mother withdrew him from the Respondent School District. To date, Petitioner continues to reside with his parents within the boundaries of the Respondent School District.

2. Since age [REDACTED] Petitioner had been provided special education services by the Respondent School District. Petitioner has been medically diagnosed with [REDACTED] he has been medically and psychologically diagnosed with [REDACTED] and he has been diagnosed with a variety of [REDACTED]. At the time Petitioner enrolled in the Respondent School District as a [REDACTED]

²The undersigned received the last volume of transcript from the hearing on March 14, 2006.

in 1998 following a psychoeducational evaluation, he was provided special education services under the eligibility category of [REDACTED]

3. In December 1998, Petitioner's mother wrote to a school official and objected to Petitioner's eligibility classification. In her December 8, 1998 letter, she wrote:

.. Initial evaluator [name deleted] concludes Petitioner's [name deleted] eligibility will be "...[REDACTED] based on eligibility with a [REDACTED] [REDACTED]". I am opposed to the eligibility classification because it does not reflect test scores documented in Initial Evaluator's [name deleted] evaluation. The eligibility classification also does not reflect Petitioner's [name deleted] present academic deficits. Some of Petitioner's [name deleted] scores in Initial Evaluator's [name deleted] denote mild retardation. His progress report dated August 20, 1998 through November 4, 1998...exhibits profound deficits in all documented areas of the general curriculum. Because of the evaluation and present academic deficits, I believe that [REDACTED] should be included in the [REDACTED] special

education eligibility classification.

4. In late 1998, Petitioner's eligibility classification was changed to [REDACTED]

5. In 2001, Petitioner's triennial re-evaluation was conducted. The evaluation report stated:

Petitioner [name deleted] began receiving services in the Respondent School District [name deleted] as a [REDACTED] under the category of [REDACTED]. He was then re-evaluated prior to entering [REDACTED] and was found eligible to receive services under the category of [REDACTED]. The MET team at the time, however, suggested that Petitioner [name deleted] be considered under the category of [REDACTED] as soon as the school received a letter from Petitioner's [name deleted] physician indicating an [REDACTED]. Further evaluation was conducted in the Fall of the 1998 school year and Petitioner [name deleted] was found eligible to receive special education services under the category of [REDACTED] based on the individual labels of [REDACTED] and [REDACTED].

[REDACTED] In the report, the psychologist..concluded that "[REDACTED] does not seem to accurately represent Petitioner's [name deleted] intellectual function" and that "it is my opinion and the opinion of the Multidisciplinary Evaluation Team that Petitioner [name deleted] would more appropriately be classified as having [REDACTED] and [REDACTED]

6. Petitioner's mother agreed with the classification and further agreed that no additional testing was necessary.

7. On January 9, 2002, the Multidisciplinary Evaluation Team met to review Petitioner's present levels and eligibility for continuing special education services. The MET report states:

The MET team convened on 1/9/02 to review these results (academic assessment, adaptive behavior assessment, speech/language assessment, hearing, vision) and determine whether Petitioner [name deleted] remained eligible for special education services and if eligible, in what areas. After review and discussion, the team agreed that

Petitioner [name deleted] continued to meet the criteria as a student with [redacted] based on the following criteria: (1) [redacted], and (2) [redacted]. Additionally, the team concurred that Petitioner [name deleted] continues to demonstrate a need for special education services as a result of these disabilities. Petitioner [name deleted] also remains eligible for [redacted]. All of the participants in attendance at the meeting, including Petitioner's mother [name deleted] and the classroom teachers, were in agreement with this decision...

8. In 2003, when Petitioner was [redacted] years old, Petitioner was re-evaluated. The 2003 evaluator [name deleted] completed the evaluation and, as part of the evaluation, Petitioner's mother participated in the Vineland Adaptive Behavior Scales (the Vineland evaluates developmental and adaptive behavior within the domains of communication, daily living skills and socialization). The evaluator wrote "Across these domains, Petitioner [name deleted] consistently functioned at or below the three year old level. He cannot initiate and proficiently complete daily living

skills consistent with same age peers. Petitioner's mother [name deleted] indicated she had to supervise Petitioner [name deleted] in all aspects of daily living skills. In the area of communications, Petitioner [name deleted] displayed many skill sets; however, he cannot reliably and consistently execute the skill sets without assistance. His communication domain score was also lowered by his significant difficulty in reading. Petitioner's [name deleted] highest score was in the area of socialization. Although, this score was only at the [REDACTED] month level, Petitioner [name deleted] could display skills such as having a preferred friend, identifying people by characteristics rather than their name, and he shows a strong sense of emotional relatedness. Overall, Petitioner [name deleted] functioned at the [REDACTED] month level in the Communications domain, a [REDACTED] month level in Daily Living Skills domain and at the [REDACTED] month level in the Socialization domain. Petitioner's [name deleted] adaptive behavior composite was less than the 0.1 percentile and consistent with the [REDACTED] month development equivalent". The 2003 evaluator concluded that:

The results of this comprehensive pediatric neuropsychological evaluation indicate that Petitioner [name deleted] is a child who has a moder-

ate level of [REDACTED] [REDACTED] He functions consistently below the [REDACTED] level in comparison to same age peers. As well, Petitioner [name deleted] displays neuropsychological impairments that necessitate his environment to be highly structured, routine and consistent, in order for him to function at his best. The results of this evaluation also indicate Petitioner [name deleted] has a [REDACTED] which is the combination of a [REDACTED] and [REDACTED]. Petitioner [name deleted] also has [REDACTED] as he has not broken the numeric code nor has he habituated an understanding of numbers. Finally, Petitioner [name deleted] has intact sensory and visual skills, however, as those skills require more frontal mediation for purposeful and complex execution, these skill sets became executed at the impaired range.

9. On September 15, 2003, Petitioner's eligibility for special education services was re-affirmed as [REDACTED] consisting of an [REDACTED] and [REDACTED] Petitioner's mother agreed with the eligibility determination made on that date.

10. In March 2004, Petitioner's mother withdrew Petitioner from the

Respondent School District³.

11. On February 17, 2005, Petitioner's mother wrote to the Respondent School District's Superintendent stating "This letter shall serve as a request for an individualized education program ('IEP') meeting for Petitioner [name deleted]. The purpose of this meeting is to develop an IEP for Petitioner [name deleted]. Thank you for your attention to our request, and we look forward to hearing from you".

12. The Respondent School District's Special Education Director responded to Petitioner's parents' letter, asking Petitioner's mother to offer three dates between March 21 and April 29 that she, Petitioner's mother, would be available for a meeting.

13. On March 1, 2005, Petitioner's mother wrote to the Respondent School District. She indicated that she was seeking an IEP for Petitioner for the 2005-06 school year and she challenged the District's offer of three dates for a meeting on the basis that the District was required to convene an IEP meeting within 15 days of the request.

14. The Respondent School District responded to Petitioner's

³Although not testified to by any witness, this finding comes from a Department of Education letter to Petitioner's parents dated May 3, 2005 as part of the Department's response to Petitioner's parents' complaint against the Respondent School District. The response was attached as an exhibit to the Respondent School District's Motion for Summary Judgment dated November 2, 2005.

mother's March 1, 2005 letter by indicating that, because Petitioner is not enrolled in the District and because the District did not place or refer Petitioner to his private school, the 15 day rule for convening an IEP meeting does not apply. The letter also stated "Based upon the advice of legal counsel, the District is declining to schedule the requested IEP meeting at this juncture. However, if you do intend to enroll Petitioner [name deleted] as a student in the District for the 2005-2006 school year, you may enroll him after the current school year ends, and the District will schedule an IEP meeting to be scheduled prior to the start of the 2005-2006 school year". The Respondent School District's letter also indicated that it wished to convene an IEP meeting either at the end of July or the beginning of August on a date convenient to Petitioner's mother and that personnel from Petitioner's current educational placement would be invited "regarding Petitioner's [name deleted] most current academic and functional performance".

15. In March 2005, Petitioner's mother informed the Respondent School District that she would enroll Petitioner as a student in the District under the District's open enrollment policy. Petitioner does not and did

not qualify for enrollment under Policy J-0750 (JFAA)⁴.

16. On March 18, 2005, Petitioner's mother requested that the Respondent School District re-evaluate Petitioner for his special education needs. A meeting was thereafter set for April 13, 2005 to review Petitioner's special education eligibility.

17. The Multidisciplinary Evaluation Team (MET) met on April 13, 2005. Petitioner's progress was reviewed and additional testing/evaluation was agreed to. Petitioner's mother reported to the Team that Petitioner has "blossomed", that he is performing more independent tasks, that he has stopped taking medication, that he is advocating for himself, that he is more confident now, that he is typing 'fast' and that the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Petitioner's mother informed the Team that she was going to have a nonverbal cognitive evaluation performed, the results of which she would provide to the Respondent School District upon its completion. The Team members agreed to meet again when the testing/evaluation had been completed.

⁴The undersigned takes administrative notice of the Policy as it was attached as an exhibit to the Respondent School District's Motion for Summary Judgment.

18. On May 25, 2005, the MET Team met again for a re-evaluation review meeting. The nonverbal cognitive evaluation had been performed on May 10 but the report was not available to the Team at the May 25 meeting. The Team agreed that a Respondent School District psychologist would observe Petitioner at his current school, the Team agreed that the psychologist would discuss with the Special Education Director the issue of including [REDACTED] in Petitioner's eligibility categories as a [REDACTED] eligibility category and the Team agreed to meet again after the nonverbal cognitive evaluation and the class observation was available.

19. On June 8, 2005, the Special Education Director sent a Prior Written Notice to Petitioner's mother in which she wrote "Based on the state criteria for [REDACTED], student is not eligible for this category at this time. Parent has stated that an evaluation has been completed at the Psychology Center [name deleted] and will be shared with the team. The team will reconvene once the evaluation report is provided and an observation by the school psychologist for the home school [name deleted] is conducted.

20. In June 2005, Petitioner's mother enrolled Petitioner in the Respondent School District but, on June 29, 2005, she withdrew him from

the District. On the next day, Petitioner's mother filed a due process hearing request alleging numerous violations of law by the Respondent School District.

21. The nonverbal cognitive evaluation was conducted by the 2005 evaluator [name deleted] on May 10, 2005 but the report was not delivered to the Respondent School District by Petitioner's mother until July 22, 2005. The 2005 evaluator [name deleted] was contacted by Petitioner's mother because Petitioner's mother thought that the 2003 evaluator's [name deleted] evaluation "may have been impacted by [REDACTED]". At the conclusion of her evaluation, the 2005 evaluator's [name deleted] diagnostic impression was recorded as:

Petitioner's [name deleted] presentation is complex and multifaceted. Medical/developmental history indicates the following diagnoses: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Nonverbal cognitive ability is within [REDACTED] range of intellectual impairment.

Eligibility for special education services should be considered. Petitioner's [name deleted] delays in nonverbal cognitive ability indicate that his rate of learning is slower than his typical peers. He will need specific instruction and intense repetition of information to over learn concepts and strategies. Generalization to novel situations may require cuing and prompting initially to support his ability to learn to generalize.

22. The Special Education Director sought dates for which Petitioner's mother would be available for another Team meeting and August 1, 2005 was selected as the meeting date. Representatives from Petitioner's private school could not attend on August 1 so the meeting was postponed to August 5.

23. On August 3, 2005, Petitioner's mother was called out of state for a family emergency and she was unable to attend the Team meeting on August 5⁵. The private school representatives did not indicate their availability to attend the August 5 meeting so the meeting proceeded in the absence of Petitioner's mother and representatives of the private

⁵On the previous day, August 2, 2005, Petitioner's mother told the Special Education Director that she, Petitioner's mother, would not attend the Team meeting on August 5.

school.

24. The MET Team concluded at the August 5, 2005 meeting that Petitioner continued to need special education services as a [REDACTED] student having an [REDACTED] and [REDACTED]. An IEP was written at the meeting which included special education services in the areas of reading/language arts, math, academic lab and speech therapy⁷.

25. On August 9, 2005, the Special Education Director sent a Prior Written Notice to Petitioner's mother informing her that the Team met and "based on the data, the student continues to be eligible in the category of [REDACTED].

26. The Special Education Director later wrote to Petitioner's mother and suggested three alternative dates in September for a meeting. Petitioner's mother did not respond to the Special Education Director's

⁶The private school representative telephoned the Special Education Director after the MET meeting and told her that the private school representatives were not available that day. In their absence, the Team thought that, since the private school representatives attended the April 13 and May 25 meetings, the Team had enough information about Petitioner's present levels of academic performance.

⁷The Special Education Director had been told by Petitioner's mother that Petitioner did not have a special education program available at either the private school or in the Respondent School District. The Special Education Director wanted an IEP in place at the beginning of the 2005-06 school year in the Respondent School District which could be adapted as needed after Petitioner would enroll in the District.

letter regarding meeting dates.

27. As a result of the due process hearing request, the undersigned ordered additional evaluations to be conducted as Petitioner's mother had requested and Petitioner's mother signed her consent to those evaluations⁸. The undersigned further ordered that the parties convene an IEP meeting upon completion of the evaluations after which Petitioner's mother would inform the Respondent School District whether she would enroll Petitioner in the District.

28. On December 20, 2005, after the requested evaluations had been completed, a Multidisciplinary Evaluation Team (MET) met to consider Petitioner's eligibility for special education and to develop an IEP for Petitioner⁹.

29. At the December 20, 2005 meeting, the Team reviewed both the historical and current evaluation and assessment data it had in its possession. As a result of the meeting, the Team report indicated "the

⁸Petitioner's mother sought to have herself declared the prevailing party to whom attorney's fees should be awarded prior to the completion of the evaluations, prior to an IEP conference and prior to an evidentiary hearing.

⁹Prior to the MET/IEP meeting, through a Motion for Summary Judgment filed by the Respondent School District, virtually all of Petitioner's due process claims were dismissed by the undersigned. The only remaining issue was whether the Respondent School District offered an appropriate IEP for a parentally-placed private school student (secondarily, the undersigned would consider compensatory services if Petitioner's mother could prove that the delay in offering an appropriate IEP was District-caused).